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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GRACIELA ELIZABETH LEMUS, Defendant and Appellant.	2d Crim. No. B286817 (Super. Ct. No. 2011010583) (Ventura County)

Graciela Elizabeth Lemus[1] appeals an order revoking her outpatient status and placing her at the Department of State Hospitals-Patton (Patton). She contends (1) the trial court erred in placing her at Patton; (2) defense counsel rendered ineffective assistance; and (3) Penal Code[2] section 1608 is unconstitutional. We affirm.

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[1] She is also referred to as Gabriella Lemus in the record.

[2] Further unspecified statutory references are to the Penal Code.

PROCEDURAL HISTORY

In 2011, Lemus was found guilty but not guilty by reason of insanity (NGI) of assault with a deadly weapon (§ 245, subd. (a)(1)). She was ordered committed to Patton. In 2015, she was released into outpatient treatment through the Conditional Release Program (CONREP).

In March 2017, the trial court renewed Lemus's outpatient status pursuant to section 1606, with the commitment to expire in February 2018. In November 2017, CONREP requested that Lemus's outpatient status be revoked after she violated the terms of her release.

Dr. Lisa Bendimez, who was Lemus's CONREP clinician, requested the trial court to revoke Lemus's outpatient status pursuant to section 1608. At the revocation hearing, Dr. Bendimez opined that Lemus was a "risk to her safety and the safety of her victim and the safety of the community" and that she required rehospitalization. The doctor based her opinion on Lemus's behavior and her violations of the terms of her outpatient treatment, including contacting the victim.

On cross-examination, Dr. Bendimez testified she was a clinician at Sylmar Health and Rehabilitation Center (Sylmar), which was a "less-restrictive" facility than Patton. She testified she "believe[d]" "Sylmar could meet" Lemus's needs.

The court revoked Lemus's outpatient status. Based on the evidence presented, the court found that Sylmar was the "least restrictive setting" that "could meet" Lemus's needs, but it noted that CONREP still needed to determine whether Sylmar could accept her. The court noted "oftentimes [CONREP] send[s] us a memo . . . [¶] . . . and we go on that." With the parties' agreement, the court allowed CONREP to investigate.

The next day, CONREP submitted a memorandum stating it was in agreement with the court that Sylmar "is an appropriate placement option" for Lemus, but it was "unaware of how long it would take to secure placement at Sylmar" and whether there were "any available female beds."

Five days later, the trial court received a second memorandum from CONREP signed by Dr. Bendimez and the community program director. It stated that after further investigation, CONREP's "official recommendation" was to place Lemus at Patton. CONREP learned that Sylmar was a privately owned facility that had a "rigorous acceptance policy that is typically designed as a step-down program for individuals who have already spent time at [Patton]." CONREP concluded Sylmar was not an "appropriate option," but would consider Lemus's eligibility in the future after she received treatment at Patton. The court ordered Lemus placed at Patton.

DISCUSSION

Mootness

The Attorney General argues the appeal should be dismissed as moot because the commitment order expired in February 2018. The appeal is technically moot. However, Lemus raises constitutional and statutory issues and challenges the propriety of her placement, which may have consequences on her commitment in the future. These issues are capable of evading review because of the time constraints of a one-year commitment order. Therefore, we will address the appeal on the merits. (See *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1011, fn. 5; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1186.)

Placement at Patton

Lemus contends the trial court erred when it placed her at Patton. We disagree because Patton was the only approved placement option.

Section 1608 provides that after a revocation hearing, "[i]f the court approves the request for revocation, the court shall order that the person be confined in a state hospital or other treatment facility approved by the community program director." Lemus asserts the standard of review is abuse of discretion, which is the standard we apply to revocation orders. (*People v. Sword* (1994) 29 Cal.App.4th 614, 619, fn. 2.) Neither party cites authority for the standard of review for a placement order. However, the standard does not matter because under any standard, the trial court properly ordered Lemus placed at Patton based on the plain language of the statute. The statute requires that any treatment facility option must be approved by the community program director, and here, the director did not approve Sylmar.

Lemus contends the court should have placed her in the least restrictive environment that meets her treatment needs. (§ 2972, subd. (g); Welf. & Inst. Code, § 5325.1 [persons with mental illness have a right to treatment services that "should be provided in ways that are least restrictive" of personal liberties].) But nothing in section 1608 requires the trial court to determine the least restrictive treatment option, and we will not read this requirement into the statute. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 777.) Even if the court was required to make this determination, Sylmar was not the least restrictive facility that could meet Lemus's treatment needs because she was not

eligible for it. Sylmar had a "rigorous acceptance policy" and was intended for those who had been treated at a state hospital first.

Lemus argues the trial court violated her due process rights when it accepted CONREP's second memorandum without giving her an opportunity to cross-examine Dr. Bendimez and the community program director. She forfeits this argument because she did not raise this issue in the trial court. (*People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Gutierrez* (2009) 45 Cal.4th 789, 809 [failure to object to due process claim forfeits the issue on appeal].) Lemus only objected to the second memorandum on hearsay grounds, which was not sufficiently specific enough to encompass her due process claim. (Evid. Code, § 353; *People v. Williams* (1988) 44 Cal.3d 883, 906.)

Moreover, Lemus agreed to allow the court to consider a written memorandum with CONREP's findings on whether she could be treated at Sylmar. Although Dr. Bendimez initially stated that Sylmar was an appropriate option, the director ultimately did not approve Sylmar because of Sylmar's acceptance policies. Having agreed to accept a written memorandum, Lemus cannot now complain because she prefers the first memorandum and not the second.

In any event, there was no due process violation. Due process requires that a person receives notice and a hearing before his or her outpatient status is revoked. (*In re Anderson* (1977) 73 Cal.App.3d 38, 41 (*Anderson*); § 1608.) Lemus received notice and a full and fair revocation hearing before the court revoked her outpatient status. At the conclusion of the hearing, the court and the parties agreed to allow CONREP to investigate and submit a memorandum on whether Sylmar could accept Lemus. The second memorandum recommended that Lemus be

placed at Patton and indicated that Sylmar could not accept her. The court properly relied upon this memorandum.

Lemus argues the trial court had the inherent authority to place or transfer Lemus at a lesser-restrictive treatment facility such as Sylmar. She cites to section 1026[3] and argues that the court has "continuing power" to determine whatever orders necessary until sanity is restored. (*People v. Michael W.* (1995) 32 Cal.App.4th 1111, 1116; *In re Cirino* (1972) 28 Cal.App.3d 1009, 1014.) But none of the legal authorities Lemus cite gives the court this power. Rather, section 1608 explicitly states that a court must send the person to either a state hospital or a treatment facility approved by the community program director. The statute does not allow the court to place or transfer a person to a treatment facility without the director's approval. The court did not err in placing Lemus at Patton.

Ineffective Assistance of Counsel

Lemus argues defense counsel rendered ineffective assistance when he did not object on due process grounds when the court relied on the second CONREP memorandum. We disagree.

A defendant claiming ineffective assistance of counsel has the burden to show (1) counsel rendered deficient performance, and (2) prejudice as a result of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.) When "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim on appeal must be

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[3] Section 1026 provides that a patient cannot be released from confinement, parole, or outpatient treatment until the trial court decides that an NGI's sanity has been restored.

rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Lawley* (2002) 27 Cal.4th 102, 133, fn. 9.)

Here there is no explanation in the record as to why counsel did not object, nor did the court ask for one. Moreover, given there was no due process violation for the reasons stated above, any objection would have been futile. (*People v. Anderson* (2001) 25 Cal.4th 543, 587 [counsel does not render ineffective assistance where an objection would have been futile].) Lemus does not show that defense counsel was ineffective.

Constitutionality of Section 1608

Lemus contends section 1608 is facially unconstitutional because it does not provide a time limit within which the community program director must request revocation of outpatient status after a person is rehospitalized. She argues that without a time limit, the statute violates due process, which requires that a revocation hearing be held "as soon as is reasonably possible following the patient's return to the hospital." (*Anderson*, *supra*, 73 Cal.App.3d at p. 48.)

Lemus misconstrues section 1608. It provides that "the community program director shall notify the superior court . . . by means of a written request for revocation of outpatient status," and within 15 court days, the court "shall hold a hearing and shall either approve or disapprove the request." (§ 1608.) Nothing in this section provides for hospitalization before the court decides to approve or disapprove the request for revocation. Section 1608 only describes the process of filing a request for revocation and obtaining a hearing. Section 1610, which Lemus does not challenge, allows for the confinement of a person in a state hospital pending a decision on a request for revocation if the

director has deemed the person a safety risk and the court approves of the confinement within one court day. She therefore does not show section 1608 is facially unconstitutional. (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 176 [defendant has the burden to demonstrate the unconstitutionality of the statute].)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Charles W. Campbell, Jr., Judge

Superior Court County of Ventura

Christopher L. Haberman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.